**Albertson's Inc. *and* United Food and Commercial Workers Local 1000.** Cases 16–CA–14713 and 16–CA–14713–2

May 29, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT AND RAUDABAUGH

On September 25, 1991, Administrative Law Judge Clifford H. Anderson issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in reply to the exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions as modified and to adopt the recommended Order.

1. In part III,B,1,a,iii, of his decision, the judge found that the Respondent unlawfully threatened employees at its Watauga store with respect to talking about or soliciting on behalf of the Union. In doing so, he found it unnecessary to resolve the status of Anna Cavin—whether she was an employee or a supervisor under the Act—because whether Store Manager Mullen uttered the threat to *employee* Cavin or whether, on Mullen's instructions, *Supervisor* Cavin relayed the threat to other employees, a violation would be made out. We affirm the judge's conclusion that a violation was committed based on our finding that Cavin acted as an agent of the Respondent within the meaning of Section 2(13) when conveying Mullen's threat to statutory employees. It is unnecessary for us to resolve Cavin's status further than this to establish that an unfair labor practice occurred.

In the first place, because the judge credited Cavin's testimony that Store Manager Mullen directed Cavin to ''pass on'' to other employees his rule that anyone soliciting union support, or even ''talking union,'' would be subject to termination, we have sufficient evidence that Cavin was an agent with actual authority to utter this threat to store employees. Her utterances pursuant to that instruction are therefore attributable to the Respondent. See *Jacobo Marti & Sons*, 264 NLRB 30, 33 fn. 11 (1982) (employee Syphrit).

Even in the absence of evidence of the specific instruction, we would find Cavin to be an agent under the doctrine of apparent authority. Unlike others in the Watauga store who have departmental supervisors, Cavin works directly under Store Manager Mullen, who has overall supervisory responsibility for the facility. Cavin, as head secretary in the customer service department, serves, at the very least, as a conduit of management's orders and instructions, in light of her oversight, scheduling, and direction of the work of the three other secretaries in the department, and the authority she possesses to reprimand them for poor work performance.[2] With respect to the other employees in the store, Cavin is responsible for assuring that any employee who violates the Respondent's timecard procedure receives a disciplinary writeup, and, when employees are hired, she is responsible for making them aware of the Respondent's personnel policies, including its no-solicitation/distribution rule.

Accordingly, when Cavin relayed Mullen's general prohibition of union discussions to the secretaries in the customer service booth and the two bakery department employees, and identified it as a company policy, it was reasonable for those employees to believe that Cavin was reflecting the Respondent's policy and speaking and acting for management. Thus she acted as the Respondent's agent in the commission of this unfair labor practice. See, e.g., *Williamson Piggly Wiggly*, 280 NLRB 1160, 1165–1166 (1986), enfd. 827 F.2d 1098 (6th Cir. 1987); *Diehl Equipment Co.*, 297 NLRB 504 fn. 2 (1989); *Einhorn Enterprises*, 279 NLRB 576 (1986).

2. In part III,B,2,b, of his decision, the judge found, inter alia, that the Respondent violated Section 8(a)(3) and (1) by the addition of a ''second'' disciplinary warning to the lawful warning issued employee Jose Hernandez on August 14, 1990, concerning his violation of the Respondent's valid no-solicitation/distribution rule.[3] The judge found that Hernandez did not in fact engage in any misconduct which created ''unrest and disturbance,'' or amounted to ''threats, intimidation, coercion, retaliation, etc.'' We agree with the judge's findings, and we affirm his conclusion that the Respondent violated Section 8(a)(3) and (1) by this ''second'' warning for the reasons stated below.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] The Respondent has not established that these three secretaries are ''confidential employees'' simply by virtue of their access to confidential information. See, e.g., *NLRB v. Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170 (1981).

[3] The relevant portions of the warning document stated that Hernandez was being reprimanded for ''violating 'No-Solicitation Policy' and creating unrest and disturbance'' and that ''any further violations of the company 'No-Solicitation Policy' or threats, intimidation, coercion, retaliation, etc. at work toward other employees will result in your immediate termination.''

Thomas Lawson, store manager of the Respondent's Irving store, became aware of the Union's organizing drive in early August 1990. He was informed the following week that Hernandez was soliciting for the Union. Lawson learned that Hernandez' soliciting included instances in which his conduct violated the Respondent's lawful no-solicitation/distribution rule and in that regard was not protected activity.[4] In addition, however, Lawson learned that Hernandez had engaged in a protected discussion with Clark in the breakroom. When Clark informed Lawson of the breakroom incident, he told Clark he would see what he could do about it, although he later admitted that Hernandez' conduct in this instance did not violate the no-solicitation/distribution rule. The incident which triggered Lawson's disciplinary writeup of Hernandez occurred the next day when, according to Clark, Hernandez approached her at a cash register that she was cleaning and took her aside to ask her if she had as yet made any kind of decision about the Union. When she replied she had not, Hernandez told her to let him know when she did, and then walked away.

The foregoing evidence indicates that the disciplining of Hernandez occurred very early in the organizing drive, and 1 day after the Respondent became aware that Hernandez was engaged in protected activity. In addition, we note the overreaching character of the ''second'' warning, especially with respect to ''threats,'' ''intimidation,'' ''coercion,'' and ''retaliation'' which, as is evident from Clark's description of the incident above, did not occur, and most especially the use of ''etc.,'' which left ambiguous and open-ended the nature of any future conduct at work which would result in Hernandez' discharge. It could reasonably have been construed to include protected instances of solicitation like that in which Hernandez engaged in the breakroom.

In view of the circumstances, particularly the timing of the ''second'' warning in relation to both the incipient organizing campaign and the Respondent's knowledge of Hernandez' protected activity, and the warning's pretextual nature (to the extent that it addressed conduct not engaged in by Hernandez), we find that it was motivated by the Respondent's desire to retaliate against him for his lawful union activity and to ''chill'' such activity in the future. See, e.g., *Lancaster Community Hospital*, 303 NLRB 238 (1991).[5] We therefore conclude that the ''second'' warning violated Section 8(a)(3) and (1).[6]

3. As part of the remedy, the judge recommended that the same notice be posted at both the Watauga and Irving stores in view of the ''similarity of violations'' found at the two facilities. The Respondent has excepted to the judge's recommendation. We will adopt the judge's order for a single notice at both stores because it is a reasonable, measured exercise of the Board's remedial discretion, and consistent with what the Board has done in the past in similar circumstances.

Pursuant to Section 10(c), the Board has broad discretion to devise remedies that effectuate the purposes and policies of the Act. See, e.g., *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 898 (1984). At the same time, we are required to tailor our remedy to the unfair labor practices the remedy is intended to redress. Id. at 900. The remedial question here is whether it is appropriate to post the same notice at the Respondent's two stores, when both are in the same corporate district,[7] when employees in both stores were involved in a contemporaneous union organizing drive, and where the Respondent committed substantially similar unfair labor practices at each store in reaction to the campaign.

Although not fully analyzed by the judge, it is apparent that there is considerable similarity in the nature of the unfair labor practices committed at the two stores. At the Watauga store, employee Marquez was unlawfully interrogated concerning her discussions with union representatives. In addition, employees in the bakery department and the customer service booth were unlawfully threatened with regard to talking about or soliciting for the Union. At the Irving store, the Respondent created an unlawful, overbroad no-solicitation rule for use against employee Hernandez and discriminatorily disciplined him because of his protected solicitations on the Union's behalf. The common factor in all these unfair labor practices is the Respondent's encroachment on the Section 7 rights of employees at both stores to discuss the organizing drive then taking place—whether involving the exchange of information and opinion about it, or the solicitation of other employees on behalf of the Union.

[4] These instances included the soliciting, while each was working, of employees Sherry Culotta, Tina Olivarez, and Renee Clark—the last in the incident described below that led directly to the warning issued Hernandez. We agree with the judge that the written warning issued Hernandez was lawful to the extent it covered these examples of unprotected conduct.

[5] We also take note of the Respondent's concurrent unfair labor practices at the Watauga store.

[6] We are not suggesting that an employer may not take appropriate action when an employee violates a lawful no-solicitation rule or engages in other misconduct to which the employer has a right, and in some cases an obligation, to respond. To the extent that the Respondent's warning was drafted to address the unprotected conduct known to have been committed by Hernandez, it remains valid. An appropriate response need not, however, sweep so broadly as to put in doubt an employee's right to engage in union solicitations protected by the Act without fear of punishment by his or her employer.

[7] Although not noted by the judge, the record establishes sufficiently that the two stores are in the same corporate district.

In *G. C. Murphy Co*., 216 NLRB 785 (1975), the Board found it appropriate to post a single notice at the two stores where the employer had committed unfair labor practices, because of the ''considerable similarity in the nature of the violations in the two stores'' and because they were apparently located in the same corporate region in the employer's organization. Id. at 793. Accord: *ABC Liquors, Inc*., 263 NLRB 1271 fn. 4 (1982), and *Union Carbide Corp*., 259 NLRB 974 fn. 2 (1981), enfd. in relevant part 714 F.2d 657 (6th Cir. 1983), in which the Board, rejecting a broader notice-posting remedy, ordered a single notice to be posted at the employer's two facilities where violations occurred. The circumstances of the instant case are significantly similar to those in *G. C. Murphy* and subsequent precedent.

In this case, given the fact that the employees at the two stores were the subjects of a contemporaneous organizing drive by the same Union, and given the further fact that the two stores are located in the same metropolitan area as well as the same corporate district, there is at least reasonable cause for concern that the employees of one store would become aware of the Respondent's similar conduct at the other. It is therefore appropriate for the employees at each store to be informed not only of the unlawfulness of the Respondent's conduct at their own facility, but also of the similarly unlawful character of the acts committed contemporaneously by the Respondent at the other store. It is equally appropriate that the Respondent acknowledge to the employees of both stores its obligation to refrain from all such unlawful conduct. Accordingly, we find that the judge's recommendation for a single notice to be posted at both stores presents a proper exercise of the Board's remedial authority.[8]

## ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Albertson's Inc., Fort Worth, Texas, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[8] We note that our Order in this case does not involve extending a notice-posting remedy to facilities of the Respondent where no unfair labor practices have been committed. See, e.g., *Postal Service*, 303 NLRB 463 fn. 5 (1991), and *Albertson's Inc*., 300 NLRB 1013 fn. 2 (1990). In each case the Board ordered the posting of notices well beyond the location where the unfair labor practice occurred because of the linkage between the violation and a corporate policy in effect at other locations as well.

*Ruth Small, Esq*., for the General Counsel.

*Daniel L. Nash, Richard N. Appel*, and *Victoria A. Higman, Esqs. (Akin, Gump, Strauss, Hauer, & Feld)*, of Washington, D.C., and *R. Bruce Gordon, Esq*., of Orlando, Florida, for the Respondent.

*Scott A. Rosuck, Esq. (Hicks & James)*, of Dallas, Texas, for the Charging Party.

## DECISION

### STATEMENT OF THE CASE

CLIFFORD H. ANDERSON, Administrative Law Judge. I heard this case in trial on April 16, 17, 18, and 30 and May 1, 2, and 3, 1991, in Fort Worth, Texas. Posthearing briefs were submitted on June 28, 1991. The above-captioned matter arose as follows.

On August 23, 1990, United Food and Commercial Workers Local 1000 (the Charging Party or the Union) filed a charge with the Fort Worth, Texas Regional Office of the National Labor Relations Board (Board), Region 16, docketed as Case 16–CA–14713 against Albertson's Inc. (Respondent or the Employer) and amended that charge on October 16, 1990, and again on November 14, 1990. On October 31, 1990, the Regional Director for Region 16 (the Regional Director) issued an order consolidating cases, consolidated complaint and notice of hearing respecting Case 16–CA–14713 and a separate case filed by a separate labor organization against Respondent, Case 16–CA–14666. The Regional Director amended that complaint on November 21, 1990.

On October 20, 1990, the Union filed a second charge docketed as Case 16–CA–14713–2 against Respondent. On December 7, 1990, the Regional Director issued a second order consolidating cases, consolidated complaint and notice of hearing, consolidating Case 16–CA–14713–2 with Cases 16–CA–14666 and 16–CA–14713. At the opening of the hearing, I approved the General Counsel's motion to sever Case 16–CA–14666 based on an out of Board resolution of that single case. Trial proceeded on the remaining cases as captioned above.

The consolidated amended complaint as further amended at the hearing alleges conduct at two of Respondent's retail facilities located in Watauga and Irving, Texas. The complaint alleges that at its Irving facility in midsummer 1990, Respondent enforced an overlybroad no-solicitation and no-distribution policy. The complaint further alleges that Respondent at its Watauga store interrogated employees respecting union authorization cards, threatened to enforce an unlawfully broad no-solicitation clause and, finally, threatened employees with discharge for engaging in union activities. The complaint alleges these actions violated Section 8(a)(1) of the National Labor Relations Act (Act).

The complaint further alleges that Respondent at its Irving facility issued a written reprimand to employee Jose Hernandez and at its Watauga store discharged employees Cynthia Laverne McClendon and Ray Bennett. Each of these actions is alleged to violate Section 8(a)(3) and (1) of the Act. Respondent in its answer denies that it has in any way violated the Act as alleged.

All parties were given full opportunity to participate at the hearing, to introduce relevant evidence, to call, examine and cross-examine witnesses, to argue orally, and to file posthearing briefs.

On the entire record, including helpful briefs from the General Counsel and Respondent, and from my observation of the witnesses and their demeanor, I make the following

## FINDINGS OF FACT[1]

### I. JURISDICTION

At all times material, Respondent has been a Delaware corporation with places of business in the greater Dallas/Fort Worth, Texas metropolitan area where it has been engaged in the retail sale of groceries and related items. Respondent, as part of its business operations, annually enjoys revenues in excess of $500,000 and annually purchases and receives goods or services at its Texas facilities from outside the State of Texas of a value in excess of $50,000.

The complaint alleges, the answer admits, and, based on the above, I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

### II. LABOR ORGANIZATION

The Union is a labor organization within the meaning of Section 2(5) of the Act.

### III. THE ALLEGED UNFAIR LABOR PRACTICES

#### A. *Events*

The events at issue occurred during the course of an organizing campaign at Respondent's facilities in the greater Dallas/Fort Worth metropolitan area. The two facilities involved are large continuously open retail multidepartment all purpose grocery stores. At all relevant times Respondent maintained and publicized by both posting and distribution to all new employees a facially valid no-solicitation and distribution rule at each facility, inter alia, prohibiting nonemployees from soliciting and distributing literature on the premises and limiting employee solicitation and distribution activities to nonworking time and nonworking areas. The relevant circumstances may be best set forth on a store-by-store basis.

##### 1. The Watauga store

Respondent's Watauga store's general manager at relevant times was Hank Mullen and its assistant store director was Greg Moore. The market manager was Jim Ferrara, the deli manager was Rick Olinde, and the produce manager was Bob Diaz. All are admitted agents of Respondent.

###### a. *The initial authorization card events—paragraph 10 of the complaint*

In July 1990,[2] the Union began an organizing campaign among Respondent's stores in the greater Dallas/Fort Worth metropolitan area including Respondent's Watauga store. Cynthia Laverne McClendon, then a service deli clerk, testified that she was working at the store in July when union organizers entered and passed out union authorization cards to Respondent's employees including her fellow deli employee, Joey George. McClendon testified that the union organizer introduced himself to George who was working in the deli area at the time and handed George ''some'' authorization cards. George put the cards in a drawer in the deli area.

McClendon testified that sometime later Deli Manager Rick Olinde asked George if anyone had given him any ''union cards'' and that George ''said yes, and he walked over to the drawer and got them out and handed them to [Olinde].'' Olinde, in McClendon's recollection, said that he was going to turn the cards in to the manager on duty and left the area with the cards.

Rick Olinde testified that he first learned of union solicitation at the facility on his return from lunch. He recalled that deli employee Joey George spoke to him as he was transversing the deli and told him:

> Hey, Rick, while you were at lunch, some guy from the union came in and gave me these cards and sign-up sheets, and I just stuck them over here in this drawer.

Olinde testified that he asked George to repeat what he had said and that George did so. Olinde then told George that the store had a no-solicitation policy and that he was glad George had reported the matter to him. Olinde added that George should in future the tell solicitors that he could not accept such materials because of the no-solicitation policy. Olinde testified that he then took the cards out of the junk drawer and reported to the on duty manager that the no-solicitation rule had been broken. George did not testify.

###### b. *Subsequent union activity conversations—paragraph 8(a) of the complaint*

Hermelinda ''Linda'' Marquez, a produce clerk, testified that in July she was working at the facility and discovered a union authorization card on the shopping cart she was using in her duties. She testified she presented the card to her immediate supervisor, Produce Manager Bob Diaz, in the produce department in the presence of two other produce employees. In her recollection Diaz became angry, took the card, and threw it in the trash. Marquez recalled Diaz stating:

> The [union] organizers were just being run out of the store . . . And to let him know if anyone else came around, handed me a card, or talked to me about it.

Marquez' affidavit taken during the Board investigation attributed to Diaz the statement: ''He said to tell him if anyone from the union talked to me.''

Bob Diaz testified that he had a conversation with Marquez in the presence of former produce employee John Lopez in the produce room. Diaz recalled that Marquez walked up to him and told him that ''an individual had just come into the back room and handed out some cards. And it was two or three cards that she had handed to me.'' Diaz asked Marquez who the individual was and she answered that she did not know. Diaz asked for a physical description of the person which Marquez gave him. He then looked for the individual in the other areas of the store and, in passing, turned the authorization cards into the customer service booth. Diaz then returned to the produce area. There, in his recollection, Marquez asked him if he had located the individual. Diaz answered that he had not.

Marquez then asked Diaz, in his memory, what she should do if such a situation again presented itself. Diaz responded

[1] As a result of the pleadings and the stipulations of counsel at the trial, there were few disputes of fact regarding collateral matters. Where not otherwise noted, the findings are based on the pleadings, the stipulations of counsel, or unchallenged credible evidence.

[2] All dates refer to 1990 unless otherwise indicated.

that if anyone came into the back while she was working and disrupted her work she was to call one of the managers on the intercom.

Marquez testified further that about 1 month after these events, she was in the upstairs portion of the store at a table used to prepare signs. She testified that she was alone with Store Manager Hank Mullen when he asked her ''if anyone from the union had been talked [sic] to me.'' Marquez answered, in her recollection, that she had not done so ''since the last time . . . he had run them out of the store.'' In response to leading questions from the General Counsel, Marquez recalled that Mullen added that the ''union had been talking to some of the employees'' and misstating facts to them. Marquez further recalled that Mullen told her to ''let him know if anyone would talk about the union.''

Mullen recalled a conversation with Marquez about solicitation in late summer or early fall but placed the conversation in his office. He testified that Marquez came to his office and reported on a meeting of floral managers she had attended. She noted, in Mullen's memory, that another female employee in the car she was riding in had ''a car full of union cards and had asked her to join the union.'' Mullen recalled that Marquez then asked him if the store still has ''union people coming into the store passing out cards?'' Mullen answered that he did not think so and eventually the conversation ended without more relevant to unions being said. Mullen specifically denied asking Marquez to report union activities to him.

c. *The Cavin-Mullen conversations— paragraphs 8(b), (c), and (e) of the complaint*

Anna Cavin, the head bookkeeper at the Watauga store, normally works in the customer service booth located on the selling floor. She testified that in July or August while working alone on a sales report in the booth, Store Manager Mullen sat next to her. She recalled he told her: ''I am going to tell you since you work here that anyone talking or soliciting union, that is grounds for termination.'' Cavin testified she answered by saying ''okay'' at which point Mullen told her to ''pass it on'' to other employees.

Cavin testified that thereafter she ''passed it on'' to the three secretarial employees who worked in the customer service booth and later to two employees in the bakery department. She recalled that she told them: ''you can't talk about the union. It is against the company policy.''

Mullen recalled the conversation. He testified:

> Well, I told her that since she works for me, she needs to understand that she is a confiden[tial] employee and she has access to a lot of information that nobody else in the store has access to, and that all this—that she needs to keep all this information to herself.

Mullen specifically denied ever instructing Cavin not to discuss the Union. Further he specifically denied ever telling Cavin to tell other employees that they could not ''talk about the union in the store.''

Cavin further recalled that a few weeks after the initial conversation, she was alone with Mullen in his upstairs office. Mullen stated:

> that he felt like he was the messenger and that, you know, and William [Emmons, Respondent's regional vice president]—he had to report everything to William about the union activity, and he felt like the messenger would be shot.

Mullen recalled the circumstances of this conversation differently. He testified that he was in his office on the telephone speaking to John Materni, Respondent's regional head of personnel relations. He told Materni that he hated to constantly call about events at the store pertaining to the organizing efforts of the Union

> because this reminds me in the old days of where they used to shoot the bearer of bad news or kill—I said kill the bearer of bad news, you know, like shoot the messenger and get rid of the problem.

Mullen testified he was not aware that Cavin was listening to this conversation by virtue of being in the outer office, but that ''it wasn't anything she didn't already know about.''

d. *The Barslow-Mullen conversation—paragraph 8(d) of the complaint*

Zelda Barslow, a market clerk, became aware of the Union's organizing efforts in June or July. She perceived her activities to be under scrutiny by management and spoke to her market manager, Jim Ferrara, about the matter. Ferrara, in her recollection, asked if she wanted him to speak to the store manager or if she desired to. In late July or early August, she spoke to Mullen and Ferrara in Mullen's office. Barslow told Mullen that since the union authorization cards had appeared, he had been watching her more and other people were screening her telephone calls. She added that other people had reported to her and she ''didn't think it was right for them to be watching me or accusing me of anything.''

Barslow recalled that Mullen answered that her problems and perceptions were mistakes or simply innocent coincidences. She recalled that Ferrara discussed his own bad experiences with and disapproval of the Union. She further recalled that Mullen mentioned that the store had a rule against solicitation. Mullen said:

> The solicitation was you couldn't do it at the—do anything at the store. He said I couldn't talk about—whatever I did away from the store—or off the clock and away from the store was fine with him, but when I was on company time or in the store, then I couldn't discuss union.

Mullen testified his conversation with Barslow occurred in early fall. He placed the conversation in the store meat deli and indicated that, while not sure, he did not believe Jim Ferrara was present. Mullen recalled that Barslow complained of being spied on because ''everybody thinks that she belongs to the union.'' Mullen told her that he did not know what she was talking about, that she was not under suspicion and, further, told her ''[you] can join the union; you can do whatever you want on your own time.'' Mullen specifically denied that he or anyone else asked Barslow about her support for the Union or her reasons for supporting the Union. He further denied telling her that she was not per-

mitted to engage in solicitation anywhere in the store. Ferrara did not testify.

e. *The termination of employment of Steve Bennett—paragraph 13 of the complaint*

Steve Bennett started work at the Watauga store as a produce clerk in or about June 1990. He had previous experience as a produce clerk at a different grocery store chain. He was discharged on August 17.

Bennett testified that he became aware of the Union's organizing efforts in late July or August 1 and thereafter participated actively in the Union's organizing activities. Thus he testified that he attended union meetings, passed out authorization cards and fliers, and spoke with and solicited other employees.

The circumstances of Bennett's termination were recited by witnesses in two rather inconsistent scenarios. Bennett testified he was complimented by management including Bobby Diaz, the produce manager and his immediate supervisor, and received no complaints nor written warnings during his employment. Former employee Mario Rodriguez testified to Bennett's good work habits.

Produce Manager Bobby Diaz testified that Bennett initially was trained by fellow employees in the techniques Respondent used which were different from those utilized by Bennett's previous employer. Over time Diaz and Mullen testified that Bennett failed to adjust to Respondent's procedures, did not take advice and instruction well, and had growing difficulty working amicably with the other produce clerks. In late July or early August and thereafter, management received complaints from produce clerks about Bennett.

Diaz and Mullen testified that they had a conversation just before Diaz was to commence his vacation on August 11 or 12 about Bennett. Diaz indicated to Mullen that he was going to terminate Bennett on his return unless his work improved. Mullen testified that he told Diaz initially to terminate Bennett before he went on vacation but Diaz demurred because such an action would leave the department shorthanded. Mullen testified that on the evening of August 17 before Diaz had returned from vacation, he and Bennett has a conversation respecting produce department staff. Mullen determined that Bennett's conduct was continuing to cause conflict in the department and decided to terminate him. The following day, August 18, Mullen discharged Bennett. Mullen denied that Bennett's union activities were either known to him or in any way a factor in Bennett's discharge.

f. *The termination of employment of Cynthia Laverne McClendon—paragraph 14 of the complaint*

Cynthia Laverne McClendon was employed as a deli clerk until October 16. How her employment ended is in dispute. As noted supra, McClendon was involved in the events at the store on the first day of the Union's organizing drive. Thereafter she was an active union supporter passing out authorization cards, attending union meetings, and soliciting fellow employees.

McClendon came to be dissatisfied with her wage rate as a longtime employee in the deli department even though she was classified as and paid at the highest deli clerk wage rate. On October 13, she spoke to her immediate supervisor, Rick Olinde, about obtaining a wage increase or a transfer to another department with a higher wage. Olinde praised her abilities and effort and said he would do what he could. Thereafter a meeting was held on October 16, McClendon's next workday, between McClendon, Olinde, and Mullen in Mullen's office.

McClendon testified that in the meeting Mullen asked her if she would like a raise or a transfer, to which she responded affirmatively. Mullen then said: ''if you can't get a raise or a transfer, would you give your two weeks notice[?]'' McClendon recalled that she answered by saying she could not keep ''busting her rear end'' as which point Mullen told her she could ''go and punch out.'' McClendon specifically denied telling Mullen that she would either quit or look for another job, if she was not given either a raise or a transfer. McClendon further recalled that Mullen told her he would give her neither a raise nor a transfer. She specifically denied being told that any transfer would necessitate an initial pay cut because of her lack of experience in the new position.

Mullen testified that following initial greetings, he asked McClendon what he could do for her and she answered that she needed a raise. Mullen testified that he then explained to McClendon that she was at the top rate in the deli department and could not receive a wage increase in that department. She responded that she could then transfer to another department to obtain a raise. Mullen answered that, if McClendon received a transfer to the ''front end,'' she would not get a raise but would rather take a ''serious cut in pay.'' McClendon, in Mullen's recollection, shook her head in negation stating that she could not do that. Mullen repeated that he could not do as she asked. McClendon then answered: ''either I get a raise or I am going to quit or—get a transfer to another department so I can get a raise or I am going to quit.'' Mullen repeated McClendon's statement that she was determined to obtain a raise or a transfer to get a raise else she would quit. McClendon agreed that was her position. Mullen testified that conversation continued:

> And I said, Well, LaVerne [McClendon], I can't transfer you to the front end at the same rate of pay; I can't give you a raise. I am sorry. She said, Well, that is it then and stood up.
>
> . . . .
>
> She got up, Rick [Olinde] opened the door; she turned around and said something. Rick turned around and told me and said, She wants to know if you want her two-week notice. I said, No, that won't be necessary.

Mullen further recalled that after McClendon indicated she was in fact going to quit that he told her to be sure to ''punch out.'' Olinde's version of the conversation essentially corroborates Mullen's.

2. The Irving store

The Irving facility's store manager at all relevant times was Thomas Lawson, and Jeffrey David Tinsley was the drug manager. Each is an admitted agent of Respondent.

The sole events in controversy respecting the Irving facility deal with Hernandez as alleged in paragraphs 9 and 12 of the complaint.

Jose Hernandez, the scan coordinator, testified he became aware of the Union's organizing drive in or around August and became a union supporter. He sought to convince his fellow employees to join him in supporting the Union. Employees Sherry Culotta and Tina Olivarez testified that they were solicited by Hernandez over a period of a few days while working. Each complained to Drug Manager Tinsley who passed on their complaints to Lawson. Lawson in turn passed on the complaints to the regional personnel office in the person of John Materni's assistant, George Hayman, in Orlando, Florida.

A few days later Hernandez spoke to fellow employee Renee Clark. Clark, formerly a cashier at the Irving store but now employed at a different Respondent location, testified that she was approached by Hernandez during her lunch in the breakroom. She recalled that Hernandez asked her if she had heard about the Union and touted its desirability for Irving store employees. Another person entered the breakroom and Hernandez broke off the conversation. When that individual left he resumed the conversation telling Clark not to talk to others about the Union, that management was not to be involved and to ''come and ask him'' if she had any questions. Clark testified that this conversation, with its surreptitiousness, made her ''a little bit nervous.''

Clark almost immediately thereafter asked another employee, Sabina Overburg, about the Union. Overburg referred her to Store Manager Lawson. Clark then asked to speak to Lawson and met with him alone in his office. Clark testified she asked Lawson about the Union and he discussed it with her. Clark then reported what Hernandez had told her, telling Lawson that Hernandez ''made me feel uncomfortable about it, that—like we were going to do something wrong; we were fixing to do something wrong.'' She testified that Lawson then told her he would ''see what I can do.'' The meeting then ended.

Lawson recalled that Clark came to him ''very upset'' and reporting a ''real bad feeling.'' Lawson testified:

> [Clark] told me that she had been approached by Jose Hernandez in the break room and that he was soliciting for the union and that she felt threatened by one of the things he said. . . . She said that Jose told he that somebody had been going to management and telling them that they were soliciting for the union and that they were going to find out who it was.

Lawson testified that he did not regard Hernandez' breakroom conversation with Clark as a violation of Respondent's no-solicitation policy.

The following day Hernandez again spoke to Clark while she was at the ''front end'' cleaning a cash register. Clark testified that Hernandez

> came up to me, and he grabbed my arm, and he pulled me over, and he said, Have you made any kind of decision yet? And I said, No, I haven't. But he was looking around like, you know, making sure nobody was listening to us talk. . . . He just said, Let me know when you do, and he walked away.

Lawson testified he observed this meeting between Clark and Hernandez.

Clark then went to Lawson's office and reported to him. She testified:

> I told him that Jose [Hernandez] had approached me the second time, that when he did he scared me.
>
> . . . .
>
> Dave [Larson] asked me how did he scare me, and I said it was just the way that he had pulled me over and whispered in my ear, and he was looking all over the place, like—he made it seem like—when he said, Well, when you decide, let me know—the way he said it was like, you better decide quick, and it better be yes.
>
> . . . .
>
> [Larson] asked me if I was on the clock when Jose had approached me, and I told him yes. . . . He told me he would see what he could do.

Lawson recalled that Clark told him that Hernandez had again approached her about the Union. She said that she still ''felt threatened'' and appeared upset.

Lawson testified that he then reported the two conversations he had with Clark, but not other events respecting Hernandez, to John Materni's assistant, George Hayman, in Orlando, Florida. Lawson was provided with language for a ''write-up'' of Hernandez and told to issue it to him.

Hernandez was soon summoned to Lawson's office where he met with Lawson and Tinsley. Hernandez testified that he was told by Lawson that he was ''getting written up for soliciting the union in the store.'' Lawson testified he told Hernandez he was being written up for ''violating the solicitation policy and for creating unrest and disturbance in the store.'' Hernandez was presented with a standard form dated August 14, 1990, signed by Lawson and ''witnessed'' by Tinsley. Lawson then read the form to him. The form has a printed entry: ''This date the above named employee has been reprimanded concerning the following:'' Entered into the space provided in what appears to be the hand of Lawson is the entry:

> Violation ''no Solicitation Policy'' and creating unrest and disturbance.

The form contained a second printed entry stating: ''The following specific improvements have been outlined to correct the above stated areas of deficiency.'' Following this statement is the hand written entry:

> Any further violations of the company ''No Solicitation Policy'' or threats, intimidation, coercion, retaliation, etc. at work toward other employees will result in your immediate termination.

An argument ensued with Hernandez denying the allegation and Lawson stating that he had received an employee's report on Hernandez' activities and that he had seen Hernandez solicit an employee personally. Hernandez recalled that Lawson told him:

> And he said—he just told me that if anyone ever came up to—you know, came up to Dave Lawson and told him that I was soliciting or saying anything about the union again in the store, that I would be terminated on the spot.

Lawson testified that Hernandez denied the solicitation allegation and challenged Lawson's ability to know what was discussed between himself and another employee. Lawson asked Hernandez why ''employees would come to me and tell me he was [soliciting] if he wasn't doing it.'' Lawson also recalled that Hernandez asked him: ''What if somebody just came and told him that he was soliciting; what would happen?'' Lawson relied that they would ''have to take a look at it.'' The meeting ended with Hernandez refusing to sign the warning and continuing to deny the allegations. Tinsley testified about the meeting but he was able to recall few details.

3. The store no-solicitation rules

Substantial evidence was received to the effect that Albertson's stores generally and the Watauga and Irving stores in particular have at all relevant times prominently displayed Respondent's no-solicitation/no-distribution rule. Further, employees when first employed by Respondent, including those at the relevant stores, signed a form acknowledging, inter alia, the existence of the rule.

Testimony from various witnesses was received respecting the degree of observance the rule experienced at relevant times at each store. Thus there was testimony of management's enforcement of the rule on various occasions. Other evidence of incidents of solicitation which had not been prohibited was met with testimony that other attempts to solicit were prohibited when discovered.

B. *Analysis and Conclusions*

1. Allegations of violations of Section 8(a)(1) of the Act

a. *The Watauga store*

(1) Paragraph 8(a) of the complaint

Paragraph 8(a) of the complaint alleges that Watauga Store Manager Mullen interrogated an employee respecting union activities in August. The General Counsel's brief argues that Marquez' version of her conversation with Mullen in his office sustains the complaint allegation. Respondent challenges Marquez' version of events. At the threshold it is appropriate to resolve the inconsistent versions of events.

As set forth supra the versions of the conversation given by Mullen and Marquez differ not only in detail but also to some extent in context. Marquez recalled being interrogated by Mullen when he was complaining of misrepresentations by union organizers. Mullen described a conversation in which he was asked about organizers passing out cards. He specifically denied asking Marquez to report on what union organizers had said to her.

I credit Marquez' version of events over the denials of Mullen. I reach this result because I did not find Marquez was doing other than honestly testifying as to what she recalled. This conclusion is based in part on demeanor. Further, the detail of her recollection was such that I do not believe she could have easily have been simply mistaken or confused in her recollection given that she was recalling a conversation with the store manager. I do not find Mullen lied or that the conversation he described did not occur. Rather I find that the conversation described by Marquez occurred irrespective of the occurrence of the conversation described by Mullen. It is much more likely Mullen would not recall a particular conversation with 1 of the substantially more than 100 employees under his direction than Marquez would have mistakenly created the detailed events she described.

My task here is therefore not one of resolving two versions of a single conversation but rather considering the descriptions of two separate conversations. Mullen's testimony addresses a separate conversation completely apart from that described by Marquez save for his general denials respecting statements attributed to him. Having credited Marquez that the conversation she described occurred, Mullen's version of the other conversation is of little value in determining what was said in the conversation described by Marquez other in considering his general denials of remarks attributed to him by her.

Marquez' credited testimony attributes to Mullen a direct question—if anyone from the union had talked to her—and an instruction to let him know if ''anyone'' talks to her about the Union. These statements were not limited to situations where Respondent's no-solicitation rule was violated but could reasonably be interpreted to seek a report on union activities generally.[3] Mullen's question and his instruction to report subsequent union contacts were delivered by Respondent's highest supervisor at the facility and were directed to an employee who had not identified her union sympathies. Such acts are traditional violations of Section 8(a)(1) of the Act. I so find here and therefore sustain the General Counsel's complaint paragraph 8(a).

(2) Paragraph 8(b) of the complaint

Paragraph 8(b) of the complaint alleges that Mullen ''attempted to intimidate and coerce an employee by implying that Respondent would engage in retaliatory conduct due to union activities at the store.'' The General Counsel's brief argues that the testimony of witness Anna Cavin respecting the ''shoot the messenger'' remarks of Mullen sustain this allegation. Respondent contests Cavin's version of events, suggests that under any factual resolution the remark made was no more than a simple benign jest and, further, raises the issues of Cavin's supervisory and confidential employee status.

I find it unnecessary to reach the arguments of Respondent challenging the General Counsel's theory of a violation. This is so because under any interpretation of Mullen's statement, the adverse consequences arguably implicit in Mullen's remarks, i.e., the ''shooting of the messenger,'' were to fall entirely on Mullen, the messenger, and not on employees generally or on Cavin in particular. Cavin testified that this was her understanding of Mullen's statement. In *Wometco-Lathrop Co*., 225 NLRB 686 (1976), the Board reversed an administrative law judge who found that a regional manager's statement to employees that the local manager and as-

[3] Respondent cites *Provincial House Living Center*, 287 NLRB 158 fn. 2 (1987). That case held it not improper for an employer with a valid nonemployee no-distribution rule to ask employees to report on new violations of the no-distribution rule by a nonemployee who had been earlier ejected for violating the rule. Mullen's instruction to Marquez goes far beyond the circumstances in *Provincial* which case is for that reason distinguishable.

sistant manager might be replaced if the employees continued their organizational efforts violated Section 8(a)(1) of the Act. The Board in finding no violation of Section 8(a)(1) of the Act held that no reasonable threat could be inferred since the local manager was a supervisor who could be disciplined for any reason other than a refusal to participate in unfair labor practices.

I read the Board's holding in *Wometco-Lathrop* to allow an employer to threaten to fire a store manager for that store manager's conduct, if that conduct is unrelated to the commission of unfair labor practices. Accordingly, I find it unnecessary to resolve the other legal or credibility issues respecting this allegation since, at best, the General Counsel's evidence is defeated by the holding in *Wometco-Lathrop*. Accordingly, I shall dismiss this allegation of the complaint.

(3) Paragraphs 8(c) and (e) of the complaint

Paragraph 8(c) of the complaint alleges that Mullen threatened employees with discharge for engaging in union activity. The General Counsel argues on brief that this allegation is sustained by Cavin's testimony respecting her customer service booth conversation with Mullen. Respondent challenges the veracity of the proffered testimony and further argues, as noted supra, that Cavin is both a statutory supervisor and a confidential employee.

Paragraph 8(e) of the complaint was added to the complaint at trial by the General Counsel to deal with the possibility that Cavin would be found a statutory supervisor. The General Counsel's alternative theory implicit in this subparagraph of the complaint is that, assuming Cavin is found to be a supervisor within the meaning of Section 2(11) of the Act, then her repetition of Mullen's statements to other employees would violate the Act under a parallel analysis.

The testimony of Mullen and Cavin is set forth supra. I credit the version of Cavin discrediting Mullen where his testimony is inconsistent. I was very impressed with the demeanor of Cavin who convinced me that she was making every effort to truthfully answer the questions presented her and, further, that she had a clear memory of the events about which she testified. Mullen's testimony respecting these events was significantly less persuasive. Further, I credit her testimony that she passed on Mullen's remarks to employees in the bakery department[4] and the secretaries in the customer service booth. In reaching this conclusion I have considered, but not found persuasive in light of the entire record and my demeanor evaluation here, the arguments of Respondent to the contrary including the arguments that Cavin's testimony was not fully consistent with her affidavit and that Mullen had received specific training which taught him not to do precisely what he is alleged to have done here.

Real issues were raised respecting Cavin's supervisory status. I find it unnecessary to resolve those issues however because under the alternative pleading of the General Counsel's complaint paragraphs 8(c) and (e), the challenged statements to statutory employees by an agent of Respondent occurred whether they were from Supervisor Mullen to employee Cavin or from Supervisor Cavin to the customer service booth employees and bakery department employees.

Respondent further argues that all the secretaries, including Cavin, were confidential secretaries and seeks a determination that such employees are outside the protection of the Act. It is unnecessary to address such arguments however because, even if true, the result would be unchanged. Thus Mullen, an admitted supervisor who is not contended to be a confidential employee, made statements to Cavin and told her to pass them on. She did so passing them on, inter alia, to bakery department employees who are not contended to be confidential employees. Thus, even under the most favorable view of Respondent's argument, Mullen's statements were still repeated to nonconfidential/nonsupervisory employees at his specific direction.

Turning to the credited statements attributed to Mullen by Cavin, Mullen told her that ''talking or soliciting union'' is ''grounds for termination.'' Cavin passed on these remarks to other employees. Such statements are a conventional violation of the Act that needs no case citation. Respondent in a learned and comprehensive brief makes no argument controverting the proposition that such statements by a statutory supervisor to a statutory employee violate Section 8(a)(1) of the Act. I so find here. Accordingly, I shall sustain paragraphs 8(c) and/or (e). Under either theory the violation and the remedy are the same.

(4) Paragraph 8(d) of the complaint

Paragraph 8(d) of the complaint alleges that in late July Mullen ''notified employees of and threatened to enforce an unlawful, overly broad no solicitation policy.'' The General Counsel on brief at pages 12–13 argues that the statements Barslow attributed to Mullen, i.e., ''you couldn't do anything at the store . . . when I was on company time or in the store, then I couldn't discuss union,''

> modified the Respondent's policy and unlawfully restricted the employees' right to engage in union solicitations, and should be found to violate Section 8(a)(1) of the Act. *Our Way, Inc*., 268 NLRB 394 (1983).

Respondent challenges Barslow's version of events advancing Mullen's recollection, each of which is set forth in greater detail, supra.

Based on demeanor, I credit Mullen's version of events. I do not doubt that Barslow's memory of events is consistent with her testimony. I was not persuaded however that her understanding of the events or her recollection of the details of what was said was of such depth so as to overcome the credible assertions of Mullen in this aspect of his testimony. I found this particularly true where Mullen was explaining the specifics of Respondent's no-solicitation policy. Having made the credibility resolution noted, I find that Mullen did not ''restrict'' Respondent's concededly facially valid no-solicitation policy.

The General Counsel adduced evidence that various solicitations occurred at Respondent's facilities. There is no doubt that a facially valid no-solicitation/no distribution policy may not be enforced only against union activities. Further, enforcement of a rule on a sporadic or haphazard basis for other activities may render it ineffective against union activities. I do not find that Respondent's enforcement of the rule

[4] The fact that she passed on Mullen's statements to bakery department employees suggests that Mullen did not, as he claimed, simply tell Cavin that confidential information should not be shared with other employees.

on this record has risen to such a level. Occasional conduct inconsistent with the rule does not defeat it. Without resolving the testimony respecting the events, much of the inconsistent conduct described was not necessarily known to management. Further, there is substantial evidence that the rule was in fact applied often and widely to activities other than union solicitation and distribution. Given the record as a whole on this issue, I do not find that inconsistent enforcement of Respondent's no-solicitation/no-distribution rule at either location involved rendered the rule unenforceable with respect to union activities at relevant times.

Given all the above, I find that the General Counsel has not sustained her burden of proof respecting paragraph 8(d) of the complaint. Accordingly, I shall dismiss this portion of the complaint.

(5) Paragraph 10(a) of the complaint

Paragraph 10(a) of the complaint alleges that Watauga Deli Manager Rick Olinde on July 28 ''interrogated an employee respecting his possession of union authorization cards, and required that the cards be given to Respondent.'' The General Counsel offers the testimony of Cynthia Laverne McClendon respecting Deli Manager Olinde's conversation with deli clerk George. Respondent initially challenges the versions of events of McClendon arguing the more credible version of events was offered by Olinde. The testimony is presented in greater detail supra.

Having considered the testimony of both Olinde and McClendon as well as the record as a whole, I credit Olinde's version of events. First Olinde impressed me during this aspect of his testimony as an honest witness who had a clear recollection of what had occurred. McClendon was not so impressive during this aspect of her testimony. Further her role in the events was that of an observer. A witness in such a removed position would be less likely to have a participant's memory of events or to have observed the full play of the others' conversation.

Given my crediting of Olinde's version of events, I find that George in effect volunteered the initial report of events as well as the authorization cards themselves to Olinde. To the extent Olinde took the cards which had been identified as distributed in violation of the nonemployee no-distribution rule and instructed George to refuse such distributions in future, his actions are not impermissible. *Sarkes Tarzain, Inc*., 157 NLRB 1193, 1205 (1966), enfd. 374 F.2d 734 (7th Cir. 1967), cert. denied 389 U.S. 839 (1967); *Clear Lake Hospital*, 223 NLRB 1 (1976). The General Counsel has not sustained her burden of proof respecting this allegation of the complaint. Accordingly, I shall dismiss paragraph 10(a) of the complaint.

b. *The Irving store*

The only allegation of an independent violation of Section 8(a)(1) of the Act respecting the Irving store, paragraph 9 of the complaint, is inextricably intertwined with the allegation of a violation of Section 8(a)(3) and (1) of the Act respecting Hernandez, paragraph 12 of the complaint. Both paragraphs 9 and 12 will be discussed, infra, under the portion of this analysis covering allegations of 8(a)(3) and (1) violations of the Act at the Irving store.

2. Allegations of violations of Section 8(a)(3) and (1) of the Act

a. *The Watauga store*

(1) Paragraph 13 of the complaint—the discharge of Bennett

The parties closely litigated Bennett's discharge and the General Counsel and Respondent argued forcefully the relevant law and facts on brief. The General Counsel's theory is predicated in part on the credibility of her witnesses, the close timing of Bennett's union activities, and his discharge as well as the fact that Bennett was fired without the initial imposition of lessor discipline or warnings. Respondent emphasizes the weakness of the General Counsel's ascription of knowledge of Bennett's union activities to Respondent, the argued lack of credibility of the General Counsel's witnesses on the allegation and, finally, the argued strength of Respondent's contrary evidence that the discharge was performance based and independent of protected conduct.

I have considered the record as a whole and the learned arguments of counsel in reaching the result. Primarily, however, I have decided this allegation based on my resolution of credibility with a significant reliance on the relative demeanor of the witnesses. Simply put, I did not believe Bennett and Rodriguez and did believe Mullen, Diaz, and corroborating employee Simpson where their testimony differed. Based on these credibility resolutions, I find that Respondent did not have any knowledge of Bennett's union activities and, further, discharged Bennett for reasons independent of those union activities. Accordingly, I find the General Counsel has not sustained her burden respecting this paragraph of the complaint. Accordingly, I shall dismiss paragraph 13 of the complaint.

(2) Paragraph 14 of the complaint—the termination of McClendon

The General Counsel argues McClendon did not quit her employment in the critical October 16 meeting with Olinde and Mullen but was rather discharged by Respondent who seized on the situation to remove her because of her union activities. Respondent contends that McClendon presented management with an ultimatum the terms of which could not be met. Once the realities of the situation had been explained to McClendon, argues Respondent, she chose to terminate her employment.

At the threshold it is clear that no party contends that McClendon's work was other than excellent or that any grounds for discharge existed. Further, the General Counsel is not contending that, after her voluntary resignation, McClendon was improperly denied rehire by Respondent. Thus, the case turns on the meeting of October 16 and a resolution of the differing versions of events testified to by McClendon, Mullen, and Olinde. The parties litigated at some length subsequent events including McClendon's later conversations with the Union, with Olinde, and with staff at a separate facility of Respondent. So too, Olinde's conversations with other staff after the event were developed as was a record of McClendon's pursuit of unemployment compensation.

All the above post event evidence is relevant to the October 16 meeting as well as the ''quit'' issue generally and has

been considered along with other relevant record evidence. As will be discussed in greater detail, infra, I am convinced that each participant left the October 16 meeting with an impression of events consistent with his or her testimony. Thus I believe each witness testified truthfully to what he or she believed transpired at the meeting. The post event evidence largely confirms that finding. The question of what in actuality occurred at the meeting is a different proposition and one for which this evidence is far less conclusive.

Turning to the question of what actually occurred at the meeting, I reject the version of events testified to by McClendon and credit the version of Mullen and Olinde. I do so because I believe that McClendon had become sufficiently upset during the discussion that she failed to accurately perceive what was being told her at the time and, therefore, also failed to commit to memory an accurate picture of events. This finding is based primarily on my observation of each witness through the proceeding with particular reliance on their ability to perceive and recall events when under stress. Thus, I find that McClendon quit her employment when she was told that she could not obtain an immediate wage increase either through a raise in her current position within the deli department or through a transfer to a higher paying position in another department within the store.

Given this finding, I further find that McClendon was not discharged by Respondent for any reason or, more particularly, was not discharged because of her union activities and sympathies as alleged in the complaint. The General Counsel has therefore failed to sustain her burden of proof with respect to paragraph 14 of the complaint and I shall dismiss the allegation.

b. *The Irving store—paragraphs 9 and 12 of the complaint—the events respecting Hernandez*

The General Counsel alleges in paragraphs 9 and 12 of the complaint that Respondent enforced an unlawful, overly broad no-solicitation/no-distribution rule and issued a improper written reprimand to employee Jose Hernandez. Respondent admits the issuance of a warning but denies any impropriety.

The General Counsel notes that Hernandez testified that Lawson told him in their meeting respecting the written warning that, if Lawson received any reports that Hernandez was ''soliciting or saying anything about the union again in the store, that I would be terminated on the spot.'' I agree that, if credited, such a statement would violate the Act. I credit Lawson's version of this exchange however that, if he received a report which Hernandez denied, Lawson would have to look into it. I make this credibility resolution in part based on demeanor as well as on the fact that Hernandez was clearly upset during the conversation and would have been less likely to have heard and retained the details of Lawson's remarks.

I also find, as noted supra, that Respondent's Irving store's no-solicitation/no-distribution policy was not abandoned nor so riddled with exceptions in its application so as to render the rule ineffective in supporting a warning for union solicitation. Further I find that Hernandez was in fact soliciting employees during their working time and in working areas, that Respondent learned that this was so and that this was the reason for that portion of the warning addressed to the violation of the solicitation policy. With respect to these matters the General Counsel has failed to sustain her burden of proof.

As I noted on the record during the presentation of the evidence on this issues, I have much greater difficulty with the portion of Respondent's warning which addresses ''unrest and disturbance'' and ''threats, intimidation, coercion, retaliation, etc.'' Respondent argues on brief at 92:

> The reference on the warning to ''causing unrest and disturbance'' referred to the manner in which Hernandez violated the rule, which, as demonstrated by the record, had the effect of impairing on-the-job efficiency of each of the employees who was solicited.

The warning's recitation utilizes the conjunction ''and'' however, unambiguously stating that the reprimand was issued for ''Violation 'no Solicitation Policy' *and* creating unrest and disturbance.'' (Emphasis added.) Further and perhaps more importantly, the later entry on the warning listed grounds for Hernandez' immediate termination in the alternative. Thus the warning stated:

> Any further violations of the company ''No Solicitation Policy'' *or* threats, intimidation, coercion, retaliation, etc. at work toward other employees will result in your immediate termination. [Emphasis added.]

Such a warning with its explicit threat of immediate discharge, if its instructions are not heeded, goes beyond a reference to the manner in which Hernandez violated the no-solicitation rule. Further the warning is a clear expansion of the no-solicitation rule insofar as it was to be applied to Hernandez since it set additional limits on his conduct which were to be enforced by immediate termination.

Respondent argues on brief at 92:

> Even if the written warning could be read as stating two independent reasons for its issuance, the fact that Albertson's has demonstrated that it reprimanded Hernandez for soliciting in violation of its rule is sufficient. See, e.g., *Delta Sportswear, Inc*., 160 NLRB 300, 306 (1966) (''where employees was discharged for two reasons—soliciting another employee in violation of valid no-solicitation rule and threatening another employee—judge's only task . . . is to determine whether, in fact, Respondent discharged [the employee] for *either* or both these reasons'') [emphasis added].

Respondent argues, in effect, that Hernandez was warned for violation of the no-solicitation rule and would have been warned irrespective of the manner in which he engaged in that solicitation. I agree.

I do not believe that the analysis ends there however. For I view the warning as, in essence, two warnings: the first issued because of Hernandez' solicitation in violation of Respondent's valid rule, the constructive ''second warning'' issued for causing ''unrest and disturbance.'' It is far from clear, as Respondent argues, that this second warning was intended to be, or may fairly have been interpreted by Hernandez to have been, limited to situations in which Hernandez was violating Respondent's no-solicitation rule. Thus Lawson testified that, on hearing Clark's first report on her break room conversation with Hernandez, he did not view Hernan-

dez' conduct as violative of the no-solicitation rule, yet Lawson told Clark he ''would see what I can do'' about the event evincing a determination to prevent such conduct in future.

Since the conduct which formed the basis for the ''second'' warning occurred in the context of Hernandez' union activity and Respondent knew this to be the case, Respondent may not rely on a good faith but mistaken belief that Hernandez was engaged in misconduct to justify the discipline imposed. *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964). Given that the language of the warning was dictated to Lawson by a regional administrator following a report by Lawson on Clark's reports to Lawson of Hernandez' two conversations with her, it is appropriate to determine if Hernandez' conduct in his two conversations with Clarke justifies and sustains the ''second'' warning issued him.

Consideration of Clark's testimony respecting her first conversation with Hernandez, the only substantial version of that conversation in the record, reveals that she became ''nervous'' because of the surreptitiousness and secrecy with which Hernandez treated the subject of union organization. I find, and the record does not suggest otherwise, that Hernandez did not comport himself in an improper manner in this conversation. Indeed in Clark's recitation of these events to Lawson, she, in her own words, clearly identified her fears during the conversation as arising out of the secretive or confidential aspects of Hernandez' conduct.

Clark's testimony of her second meeting with Hernandez seemed more ominous. She initially described Hernandez as scary and threatening. She testified that he grabbed her arm and pulled her ear to him. Yet, immediately thereafter she recanted her testimony somewhat, suggesting that ''it wasn't anything he really did or anything; it was just his mannerism. He was just frightening.'' In her report of this conversation to Lawson, Clark noted that Hernandez had frightened her.

Hernandez and Clark testified in this proceeding and I had an opportunity to consider their demeanor in light of the events at issue. Clark is a highly sensitive young woman and clearly naive of the realities of trade union organization generally. Hernandez presents the impression of a young man with a serious demeanor and perhaps an overbearing manner. Further, there may well have been different cultural perspectives between Clark and Hernandez. For whatever reason, I find Clark's reaction to Hernandez was overwrought. More particularly, I specifically find Hernandez' conduct—setting aside the issue of whether he was soliciting at the wrong place and time—was not reasonably likely to create unrest and disturbance, nor did it involve threats, intimidation, coercion, or retaliation. Respondent may have believed the contrary—a finding I do not find it necessary to reach—but, if its agents held such a belief, they were mistaken.[5]

[5] This discussion and analysis should not be taken to detract from an employer's continuing obligation to insure that its employees are free from sexual or other improper advances by other employees at the workplace. The proposition here asserted is the venerable maxim that, where an employer is considering the discipline of an employee for misconduct occurring in the course of union activities, the employer must be sure such misconduct did, in fact, occur. Here, Respondent was not attentive to the ambiguities in Clark's reports to Lawson that should have put it on notice that Clark's subjective feelings of being threatened by Hernandez would not stand scrutiny as objectively justified.

I have found that Respondent would have issued the no-solicitation portion of its warning to Hernandez irrespective of the ''conduct'' issue discussed here. I have further found, however, that the warning was based on and contained reference to conduct which Hernandez had engaged in and which, if repeated, would be a basis for his immediate termination. I have found that the disputed conduct occurred in the context of union solicitation and that the misconduct underlying the conduct portion of the warning did not, in fact, occur. Given these findings, I further find that Respondent's addition of the ''conduct'' or ''second'' warning in its August 14, 1990 written warning violates Section 8(a)(3) and (1) of the Act. Therefore, I shall sustain this portion of the complaint.

I have found, supra, that Respondent's no-solicitation rule was valid and could properly be applied to Hernandez on August 14. Thus to this extent the General Counsel's complaint is without merit and shall be dismissed. The warning memo is however an announcement and publication of a new and narrower set of rules of conduct for Hernandez personally. Since I have found, supra, that the ''threats, intimidation, coercion and retaliation'' portion of the rule was improperly included in violation of Section 8(a)(3) and (1) of the Act, it follows that Respondent created, announced, and enforced an unlawful, overly broad no-solicitation/no-distribution rule as to Hernandez in violation of Section 8(a)(1) of the Act as alleged in the complaint. I so find.

There is a second independent basis for finding the warning to Hernandez constitutes an overly broad no-solicitation rule in violation of Section 8(a)(1) of the Act. This analysis stands irrespective of the issue of whether or not Hernandez engaged in the conduct recited in the warning. The warning threatens immediate termination if Hernandez engages in ''threats, intimidation, coercion, retaliation, *etc*.'' (emphasis added). The concluding ''et cetera''—meaning other similar things and the rest, is so obviously vague as a restriction on conduct as to be fatally overbroad and invalid. *Presbyterian/St. Luke's Medical Center v. NLRB*, 723 F.2d 1468 (10th Cir. 1983), enfg. 258 NLRB 93 (1982). Thus Hernandez, receiving a warning threatening to terminate him immediately if he engages in conduct including the ambiguous ''etc.,'' must inevitably have his Section 7 rights fatally chilled as he limits his activities in fear of committing some action Respondent would view as falling under the warning and for that reason terminating him forthwith. For this additional reason, I find Respondent's issuance of the August 14, 1990 warning to Hernandez to be an unlawful, invalid, and overbroad no-solicitation rule in violation of Section 8(a)(1) of the Act.

### C. *Summary*

As set forth with greater particularity above, I have sustained the General Counsel's allegations of violations of Section 8(a)(1) of the Act with respect to the following paragraphs of the complaint: 8(a), (c) or (e), and 9. I have dismissed the General Counsel's allegations of violations of Section 8(a)(1) of the Act with respect to the following paragraphs of the complaint: 8(b), (d), and 10(a).

I have also sustained the General Counsel's allegations of violations of Section 8(a)(3) and (1) with respect to the General Counsel's complaint paragraph 12. I have dismissed the

General Counsel's allegations of violations of Section 8(a)(3) and (1) with respect to complaint paragraphs 13 and 14.

## REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Unfair labor practices have been found to have occurred at both Respondent's Watauga and Irving stores. A threshold issue is whether copies of a single notice should be posted at each store or whether individual notices addressing the violations at each particular store should be posted. No party addressed this issue on brief. Given the similarity of violations it seems appropriate to set forth a singe notice which will be posted at each facility.

The warning issued to Hernandez was held improper because it included matters beyond a narrow warning for soliciting other employees while they were working in violation of Respondent's written no-solicitation rule. As set forth in my analysis supra, the warning was in effect two warnings—one proper the other improper. Given this finding, and on the unusual facts of this case, I shall not direct Respondent to rescind the entire warning. Rather, Respondent shall be required to excise from the warning all references to ''causing unrest and disturbance'' and ''threats, intimidation, coercion, retaliation, etc. at work toward other employees.'' The unexcised warning shall be deleted from Hernandez' personnel files. Respondent will notify Hernandez in writing that this has been done and that the deleted portions will not be relied on in any way in future personnel actions respecting him.

On the basis of the above findings of fact and on the entire record, I make the following

## CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act by engaging in the following acts:

(a) At its Watauga, Texas retail store

(1) interrogating employees respecting their union activities

(2) threatening employees with discharge for engaging in union activity

(b) At its Irving, Texas retail store by enforcing an overly broad no-solicitation/no-distribution rule with respect to an employee.

4. Respondent violated Section 8(a)(3) and (1) of the Act at its Irving, Texas store by issuing an improper warning reprimand to an employee.

5. Respondent did not otherwise violate the Act as alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

## ORDER

The Respondent, Albertson's Inc., Fort Worth, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees about their union activities.

(b) Threatening employees with discharge for engaging in union activity.

(c) Enforcing an overly broad no-solicitation rule.

(d) Issuing warnings based on violations of overly broad no-solicitation rules.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind and expunge from the warning issued to Hernandez on August 14 all references to ''causing unrest and disturbance'' and ''threats, intimidation, coercion, retaliation, etc. at work toward other employees.''

(b) Remove from its files any reference to the deleted portions of the warning to Hernandez and notify him in writing that this has been done and that the deleted portions of the warning will not be used against him in any way.

(c) Post at its Watauga and Irving, Texas retail facilities, copies of the attached Notice marked ''Appendix.''[7] Copies of the notice, on forms provided by the Regional Director for Region 16, in English and such other languages as the Regional Director determines are necessary to fully communicate with employees, after being signed by Respondent's authorized representative, shall be posted for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure the notices are not altered, defaced or covered by other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent has taken to comply.

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

## APPENDIX

### NOTICE TO EMPLOYEES
### POSTED BY ORDER OF THE
### NATIONAL LABOR RELATIONS BOARD
### An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT interrogate employees about their union activities.

WE WILL NOT threaten employees with discharge if they engage in union activities.

WE WILL NOT enforce overly broad no-solicitation rules.

WE WILL NOT issue warnings to employees who violate overly broad no-solicitation rules.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees and or employee applicants in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL rescind and delete all references to conduct other than solicitation as described in our posted no-solicitation rule from the warning issued to Watauga store employee Jose Hernandez on August 14, 1990.

WE WILL remove from our files all references to conduct other than that described in our posted no-solicitation rule on the warning issued to Hernandez and WE WILL notify Hernandez in writing that this has been done and that the deleted references will not be used against him in any way.

ALBERTSON'S INC.